United Nations A/HRC/32/36/Add.5

General Assembly

Distr.: General
15 June 2016

English only

Human Rights Council
Thirty-second session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his mission to the Republic of Korea: comments by the State

GE.16-09922(E)
1609922

Please recycle

Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his mission to the Republic of Korea: comments by the State*

Introduction

1. The Republic of Korea welcomes the visit of the UN Special Rapporteur (SR) on the rights to freedom of peaceful assembly and of association and is pleased to have had a constructive dialogue with the SR during his visit.

2. The Government of the Republic of Korea welcomes the high appreciation of the SR on the proud history of Korea's democratization and its vibrant civil society, and is pleased to note his recognition of relevant laws and good practices. The Government takes note of his recommendations to promote and protect the freedom of peaceful assembly and association, and will give due consideration to them.

3. We thank the SR for the opportunity to comment on his report on the situation of the freedom of peaceful assembly and association in the Republic of Korea, and would like to comment as follows.

Freedom of peaceful assembly

Notification and peaceful assembly

4. **Para 21**: It is generally accepted to use the Constitution and national laws as the determinant for judging the lawfulness of an assembly based on the principle of legal clarity, since national laws specify prohibited actions and the following sanctions in a clearer manner than international human rights laws.

5. **Para 23:** The Government does not deem an assembly unlawful because of violent actions by a few. An assembly is dispersed in due process when there is significant danger to public order, for instance, when it turns collectively violent.

Management of assemblies

6. **Para 33:** The Korean National Police Agency (KNPA) confirmed that it never used water cannons against peaceful and legal assemblies. They were only used to block or disperse illegal and violent demonstrators who, for instance, attempted to break the police line by binding police vehicles with ropes or to damage police vehicles.

7. **Para 34:** The Constitutional Court dismissed the case on the use of water cannons mentioned by the SR because it did not require a constitutional review; it belonged to the jurisdiction of an ordinary court, as it did not concern a violation of the Constitution but the compliance of the use of water cannons with the requirements of the applicable laws. With the dismissal, the Constitutional Court gave its opinion on the case: the infringement on basic rights by using water cannons would not be repeated since relevant laws clearly prescribe the legal grounds of, limitations on, requirements for, and methods of their use,

* Reproduced as received.

and also since law enforcement activities of the police are strictly reviewed by the Judiciary.

8. **Para 38:** The KNPA has adhered to the principle of placing experienced police officers on the frontlines to manage assemblies and demonstrations. In urgent cases, a temporary disposition of conscripted policemen on the frontlines may be required. However, even in such cases, police officers substitute for the conscripted and stand on the frontlines upon their arrival and the conscripted officers are placed at the back so as to prevent any direct clash between the conscripted officers and the participants.

Investigation and penalization

9. **Paras 39-41:** The organizers of an assembly may have collective liability with the participants committing unlawful activities only in a case of compensation for damages incurred due to intention or negligence in a civil case. They have the duty to ensure a peaceful assembly both in terms of its purpose and procedure. Thus, if the organizers intentionally or negligibly fail to do so, and it is clear that they are in control of the participants, they are liable for the collective illegal actions.

10. Mr. Park Lae-goon was convicted of leading an illegal and violent assembly in April 2015 held one year after the Sewol ferry disaster, and he has appealed the decision. SR's comment that "the case of Mr. Park Lae-goon exemplifies the intimidation and harassment that organizers of peaceful protests face" should be revised, since it is in conflict with the fact that the criminal prosecution of Mr. Park for his own actions and the protests he organized were not peaceful ones.

11. **Para 42:** Only when assembly participants intentionally break away from the protest paths that they reported in advance and cause major obstruction to traffic, are they charged with general obstruction of traffic. Such charges are not to discourage assemblies on the streets. The Supreme Court also does not declare participants of lawful assemblies guilty of the crime of general obstruction of traffic.

12. The Government allows the use of public space for assemblies. In order to protect the rights of other citizens and to maintain public order, the organizers are required to report the course of the march in advance, and to appoint moderators to ensure the assembly marches as planned.

13. **Para 43:** As stated at the debriefing in January as well as in the supplementary information provided in April by the Government of the Republic of Korea, the attachment of name tags on riot gear is under 'careful consideration' as this may disclose the police officers' personal information and infringe on their privacy.

Freedom of association Associations

14. **Paras 50-51:** The Government believes it is necessary to regulate the unlawful collection and use of donations for the public interest. As part of its efforts, the Government has amended relevant laws to promote a sound and mature donation culture. Following the revision in 2006 from a license system to a prior registration system made to lift control over donations, the Government plans to submit to the National Assembly an amended bill of the Act on Collections and Use of Donations, which aims at expanding the range of collections registration.

15. **Para 52**: The Prime Minister's Advisory Committee for Civil Society Development serves as a consultative body with participation of representatives of civil society. It discusses the ways to establish a constructive relationship between the Government and

civil society and to further vitalize civil society. The Government looks forward to the Advisory Committee putting forth useful proposals for the development of civil society and for the build-up of a cooperative relationship between the Government and civil society. The government also plans to give full support for the Committee's fruitful work.

Labor unions

16. **Para 56:** The Constitution of the Republic of Korea prescribes the duty of political impartiality for public officials. Relevant laws prohibit public officials and teachers from engaging in political activities such as election campaigning to keep them unbiased to the interests of any political factions or parties. In the realm of education, political impartiality means that there should not be unwarranted interference by national authorities or political parties, nor education be embroiled in political activities. The Government prohibits political activities of teachers' trade unions which consist of elementary and middle school teachers in order to prevent students from being negatively influenced by their teacher's political orientation in the course of the formation of their personalities and values.

17. **Para 57**: The recommendations of the Committee of Experts on Freedom of Association (CFA) should be respected as stated in the report, but it may be difficult to fully implement them given the different domestic systems and cultures of each country. The Government submitted a revised bill to the National Assembly in 1999 to grant membership of trade unions to dismissed workers but the bill was shelved during deliberation. In 2006, representatives of tripartite parties of labor, management and government agreed to maintain the current law which restricts eligibility of dismissed workers for members and leaders of trade unions.

18. In particular, the Act on the Establishment, Operation, etc., of Trade Unions for Teachers (AEOTUT) and the Act on Establishment and Operation, etc., of Public Officials' Trade Unions (AEOPOTU) were enacted as special laws, unlike other trade union acts, given the following elements: distinctive job characteristics of public officials and teachers such as their influence on public interests, professionalism and autonomy; their unique qualification, status and recruitment process; and public expectation on public officials and teachers. The Constitution also provides that three basic labor rights of public officials and teachers may be prescribed differently from those of general workers. It should be also emphasized that the AEOTUT was established as a result of public discussion and tripartite agreement.

19. **Para 58:** The AEOTUT and the AEOPOTU confines the membership of trade unions to public officials and teachers in office, as well as to dismissed ones whose cases on requesting remedy for unfair labor practices are under review by the Labor Relations Commission. However small the number of dismissed ones may be, the bylaws of the Korean Teachers and Education Workers Union (KTU) and the Korean Government Employees' Union (KGEU) recognizing those whose dismissal was confirmed by the National Labor Relations Commission as members are a clear violation of the AEOTUT and AEOPOTU and would undermine legal stability and consistency unless they are corrected. The bylaws thus are grounds for revoking the registration of KTU and KGEU as trade unions under the Trade Union and Labor Relations Adjustment Act (TULRAA). This was confirmed at the Supreme Court.

20. **Para 59:** The union registration system does not infringe on the right to freedom of association. The system is designed to ensure that workers exercise their right to freedom of association in an autonomous and democratic manner, by allowing unions that fulfill legal requirements to freely seek registration and by preventing the rampant establishment of organizations that fail to meet legal requirements. The TULRAA, prescribing the requirements for trade unions, does not protect organizations that fail to fulfill those

requirements. This is in conformity with both the principle of minimum infringement and the principle of the balance of legal interests. It was also confirmed by the Constitutional Court.

21. **Para 60:** For people in special forms of work, it is unreasonable to uniformly apply labor laws which are based on 'superior or supervisor – subordinate relations.' This is because there is no clear criterion to distinguish them from the self-employed, and many of those in special forms of work do not have employment contracts but civil law contracts. In this regard, the court decides whether people in special forms of work are subject to labor laws after fully taking into account 'superior or supervisor – subordinate relations,' by considering whether they are under direction or supervision of their contractors and whether they were paid for their service. In case that people in special forms of work are not considered as subordinate to their contractors, it is difficult to recognize the validity of collective agreement between those in special forms of work and their contractors. However, those in special forms of work have the right to freedom of association to represent their interests, through which they can make requests to their contractors. These organizations may freely operate without any intervention from the Government.

22. **Para 66:** The Supreme Court's decision was made on the grounds that the VESK Union is an autonomous union, regardless of the management's support for the union. In this regard, contrary to the concerns of SR, the ruling of the Supreme Court will not have an effect to encourage the formation of unions sponsored by the management.

The right to strike

23. **Para 71**: In response to the criticism that the arbitration by the authority in essential public services was an excessive restriction on the right to strike, a tripartite agreement was reached in September 2006 to abolish the arbitration by the authority in essential public-service businesses and to introduce the term 'minimum services to be maintained.' The term refers to essential public services such as railway and aviation, which could seriously endanger the lives, health, physical safety or daily activities of the public, if suspended or discontinued. This is to ensure the proper maintenance and operation of a minimum level of services during a period of industrial action. The TULRAA was revised to reflect the agreement and the relevant recommendations of the ILO and others that the arbitration system runs counter to the freedom of association.

24. Criteria for minimum services to be maintained is set based on their influence on people's daily activities. This is far from an excessive restriction in light of the ILO's view of recognizing restriction on the right to strike as legitimate for services whose suspension might threaten people's normal living conditions.

25. **Para 73**: Collective bargaining or industrial action which does not violate the TULRAA is not subject to criminal or civil liability. Accordingly, unions do not bear criminal or civil liability unless they are engaged in illegal activities. In particular, civil liability of unions is not decided upon the employer's claim but by a ruling of the court. The obstruction of business is established only when a strike is deemed to suppress free will of an employer to continue his or her business, as in the case of an unforeseeable and abrupt strike incurring significant damage or tremendous disorder to business operations. Therefore, it is inappropriate to assume that imposing civil or criminal liability on illegal activities undermines the freedom of association.

Political parties and associations pursuing political objectives

26. **Para 76:** As of May 2016, 28 political parties are registered to the National Election Commission, and 21 political parties fielded candidates for the 20th National Assembly elections in April 2016. In comparison with countries like the UK and the USA where legal threshold is not set for the number of party membership and its regional distribution as conditions to establish a political party, it cannot be said that the Republic of Korea has a relatively small number of political parties.

27. **Paras 77-79:** We appreciate the SR's acknowledgement that the Republic of Korea faces unique challenges in view of the unsettled relationship with North Korea. The Government supplemented the criminality elements for Article 7 of the National Security Act (NSA) to clarify the regulations, in response to the recommendations by the UN human rights mechanisms for the concern over the danger of misuse and abuse of the NSA. With regard to its interpretation, the NSA is being applied as strictly as possible according to the rulings of the Supreme Court and the Constitutional Court. After having ruled that some articles in the former NSA could have infringed on people's basic rights; the Constitutional Court ruled that the amended NSA no longer violated the basic rights.

28. It is regrettable that the SR said 'he is not convinced that the terms used in Article 7 of the NSA are as clear as the Constitutional Court pronounced,' despite the earlier submission of a supplementary information on the Act in a written manner. And in fact, there still remain forces that follow North Korea and attempt to destroy liberal democracy. The Government whose duty is to protect its citizens needs to maintain the NSA.

29. **Paras 80-81:** The SR described the Unified Progressive Party (UPP) in his report as an 'outspoken critic of the Government', whose activities are 'minority expressions of support for North Korea.' The ruling was made in accordance with constitutional procedure and institution as the last resort for the Republic of Korea to secure the very existence of nation, democracy, human rights and the rule of law. The SR's description of the decision by the Constitutional Court as 'drastic retaliatory actions' lacks understanding as to the serious nature of the threat posed by the UPP to the national security of the Republic of Korea and is deeply regrettable.

30. The leading profile of the UPP was to praise the North Korean regime, over which the UN General Assembly and the Human Rights Council both have expressed their deep concern for its systematic and gross violation of human rights. They had convened a series of gatherings to conspire a potential insurrection for the benefit of North Korea and had openly espoused the North Korean regime's argument for its nuclear arms development banned by the UN Security Council. Defining the Republic of Korea as an enemy, they discussed plans to purchase, steal and manufacture firearms and explosives, and plotted to destroy Korea's national infrastructure including railways and communications systems in order to overthrow the nation. They even attempted to incite terrorism by providing manuals on using privately manufactured bombs.

31. These activities were not merely 'minority expressions of support for North Korea,' but a plot to violently rebel. Considering its probability and risks, they constituted a clear and real threat and danger to the Republic of Korea.

32. In fact, its platform, activities related to the insurrection, illegitimate primary for selecting proportional representatives, violent incidents at the Central Committee, and manipulation of polls in local elections had vindicated that the UPP's criminal activities cannot be solely attributable to a few of its deviant members but to the UPP itself; they posed a serious threat to the democracy of the nation. In this respect, the ruling to dissolve the UPP was an indispensable measure to protect the democracy, human rights, and the rule of law in the Republic of Korea.

33. The system of adjudication on the dissolution of political parties was introduced by the constituent power in order to save the political activities of the minority from the tyranny of the majority, and at the same time to impose constitutional restrictions on the freedom of political parties. The Constitutional Court made the ruling after a total of 20 rounds of hearing, examination of 170,000 pages of paper evidence, and questioning of people of reference and witnesses. Consequently, the dissolution served as a last resort to protect the people from the activities of the UPP in accordance with the principle of strict proportionality.

34. Given that the ruling was made in accordance with the democratic procedures to prevent an attempt to violently overthrow the nation and to protect the general population from the unconstitutional party, the Government believes that the description of the ruling as a 'drastic retaliatory action' which was taken amidst 'disquieting circumstances' fails to reflect the reality and is biased. It should be revised.

Conclusion

35. In conclusion, we would like to assure the SR of the continuous support for his mandate and wish to thank him for his visit and this report